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AMERICAN TRUCKING ASSOCIATIONS V. EPA: THE PHOENIX (“SICK CHICKEN”) RISES FROM THE ASHES AND THE NONDELEGATION DOCTRINE IS REVIVED

David M. Richardson⁺

The constitutional doctrine of nondelegability—that Congress may not delegate legislative powers—is grounded primarily in Article I, section 1 of the U.S. Constitution, which begins “[a]ll legislative Powers . . . shall be vested in a Congress of the United States.”¹ Although this clause implicitly prohibits Congress from delegating its powers to others, federal courts have been reluctant to invalidate federal regulations based on the nondelegation doctrine.² In fact, the Supreme Court has not quashed a federal statute for an unconstitutional delegation of legislative power since 1935.³

In 1935, the United States Supreme Court declared the granting of broad discretionary power to the President unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*⁴—the so-called “sick chicken” case.⁵ The Court ruled that Congress’s failure to mandate standards to

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1. U.S. CONST. art. I, § 1, cl. 1.

2. See *American Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1057 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999) (Tatel, J., dissenting) (explaining the nondelegation doctrine’s limited use by the federal judiciary during the past 60 years), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257); see also WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 182 (8th ed. 1996) (recognizing the Supreme Court’s reluctance to invalidate federal statutes under the nondelegation doctrine).

3. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42, 550-51 (1935) (invalidating the National Industrial Recovery Act (NIRA) after the Court concluded that Act unconstitutionally delegated legislative authority to the President); see also Randolph J. May, *D.C. Circuit Decision Draws Needed Spotlight to Nondelegation Doctrine*, LEGAL TIMES, June 21, 1999, at 20 (arguing for the Court’s return to *Schechter* type decisions).

4. 295 U.S. 495 (1935).

5. See *id.* at 541-42 (declining to recognize the Live Poultry Code as authorized under section 3 of the NIRA); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 414-20, 430 (1935) (nullifying the President’s power under section 9(c) of the NIRA to ban the interstate shipment of petroleum); WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 34 (3d ed. 1997) (referring to *Schechter* by its nickname, the “sick chicken” case).

guide the executive branch in its exercise of discretion would result in the nullification of such delegations as unconstitutional.⁶ Since 1935, the Court has consistently upheld the delegation of broad rulemaking power to federal agencies,⁷ including instances when the Court could not find any congressionally-prescribed standards whatsoever.⁸

Although the courts have been reluctant to require stringent standards from Congress since the "sick chicken" decision in 1935,⁹ the United States Court of Appeals for the D.C. Circuit recently revived the non-delegation doctrine in *American Trucking Ass'ns v. EPA*.¹⁰ In *American Trucking*, a divided three-judge circuit panel found Environmental Protection Agency (EPA) rules, which established strict national air quality standards under the Clean Air Act,¹¹ to be unconstitutional.¹² The EPA promulgated the rules to reduce ground-level ozone and particulate mat-

6. See *Schechter*, 295 U.S. at 541-42 (articulating that Congress, in performing its lawmaking responsibilities, may not delegate its authority without establishing standards that limit administrative discretion); *Panama Refining*, 293 U.S. at 421 (declaring that Congress may delegate only "to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply").

7. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (upholding the creation of the United States Sentencing Commission, a quasi-judicial independent agency); *Yakus v. United States*, 321 U.S. 414, 419, 426 (1944) (upholding the delegation of rule-making power to a price administrator to control inflation by fixing the maximum prices for various commodities); see also, e.g., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 79 (Johnny H. Killian & Leland E. Beck eds., 1987) [hereinafter U.S. CONSTITUTION: ANALYSIS] (concluding that the history of the nondelegation doctrine indicates that "the Court does not really require much in the way of standards from Congress").

8. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755-56, 783-87 (1968) (upholding a price fixing schedule developed by the Federal Power Commission for the natural gas industry, despite the lack of apparent statutory authority to enact such a rule); *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416-18, 421-22 (1967) (upholding an Interstate Commerce Commission rule that regulated transportation services despite the agency's unsuccessful attempts to attain such authority from Congress).

9. See *supra* notes 7-8 and accompanying text; see also *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.").

10. 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257). See U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 78 (recognizing that "the Court has in recent years paid scant attention to delegation as a constitutional issue").

11. 42 U.S.C. §§ 7408-09 (1994).

12. *American Trucking*, 175 F.3d at 1033.

ter (PM), commonly referred to as smog and soot.¹³ After reviewing the EPA's construction of the Clean Air Act, the court concluded that the agency's revised smog standards exceeded the scope of the Clean Air Act and resulted in an unconstitutional delegation of legislative power.¹⁴ The full circuit supported the three-judge panel's nondelegation ruling and denied the EPA's request for a rehearing en banc.¹⁵ In January 2000, the United States Department of Justice, on behalf of the EPA, petitioned the Supreme Court to review the D.C. Circuit's decision.¹⁶ The Supreme Court granted certiorari in May 2000.¹⁷ If the Supreme Court affirms the appellate court, *American Trucking* will impact considerably the federal government's future efforts to implement broad regulatory programs.¹⁸

This Note examines the interpretive evolution of the nondelegation doctrine from its origins to the present day. Part I of this Note presents a concise exposition of notable cases that have guided the U.S. Supreme Court, as well as the D.C. Circuit, in the development of this area of constitutional and administrative law. Part II discusses the significant facts, procedural history, and majority and dissenting opinions of *American Trucking*, as well as its impact on prior law. Finally, Part III analyzes the

13. See *id.*; see also Margaret Kriz, *Why the EPA's Wheezing a Bit*, NAT'L J., July 24, 1999, at 2166 (reporting on the EPA's reasoning for promulgating broad air quality rules and its reaction to the *American Trucking* decision).

14. See *American Trucking*, 175 F.3d at 1033.

15. See *American Trucking Ass'ns v. EPA*, 195 F.3d 4, 14 (D.C. Cir. 1999) (per curiam) (denying the EPA's request for a rehearing en banc), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257). The court did grant the EPA's petition for rehearing in part and agreed to modify portions of the original opinion, which did not concern the nondelegation doctrine. See *id.* at 8-10.

16. See *id.*, petition for cert. filed, 68 U.S.L.W. 3496 (U.S. Feb. 8, 2000) (No. 99-1257).

17. See *id.*, *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 23, 2000) (No. 99-1257).

18. See Kriz, *supra* note 13, at 2167. There is a fair chance that the Supreme Court will uphold the D.C. Circuit's decision considering the Court's recent innovations in other constitutional issues, such as state sovereignty. See *id.*; see, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress violated the states' Eleventh Amendment sovereignty immunity rights when it empowered Indian tribes to sue states in federal court); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress exceeded its authority by intruding into the states' traditional prerogatives of policing its citizens); *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that Congress violated the state sovereignty doctrine by requiring local law enforcement officers to conduct criminal background checks on handgun purchasers); *Maine v. Alden*, 527 U.S. 706, 754 (1999) (declaring that states deserve constitutional protection from federal suits brought in their courts). Over the last several years, the Court has declared, usually by simple majorities, that there are constitutional limits to federal authority. See ABNER J. MIKVA & ERIC LANE, *THE LEGISLATIVE PROCESS* 1-2 (Supp. 1998); see also *infra* notes 178-80 and accompanying text (analyzing the possible significance of the *American Trucking* decision).

significance of *American Trucking* and argues that the D.C. Circuit's approach in revitalizing the nondelegation doctrine is a healthy development that will lead to a more accountable federal bureaucracy and strengthen the separation of powers doctrine in a workable manner.

I. A LOT OF TALK BUT LITTLE ACTION: THE EVOLUTION OF THE NONDELEGATION DOCTRINE PRIOR TO *AMERICAN TRUCKING*

A. Development of the Supreme Court's Nondelegation Doctrine Jurisprudence

In 1935, the nondelegation doctrine underwent an important development because, for the first time in history, the Supreme Court exercised the doctrine to strike down two statutorily created federal programs—the “Petroleum Code” and the “Live Poultry Code” of the National Industrial Recovery Act of 1933 (NIRA).¹⁹ Ironically, 1935 was also the last year in which the Court used the nondelegation doctrine to invalidate a federal statute.²⁰ The Court protected statutes consistently from nondelegation attacks before and after it decided *Panama Refining Co. v. Ryan*²¹ and *Schechter* in 1935.²² Some commentators have concluded that

19. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (striking down the Petroleum Code as an unconstitutional delegation of legislative power to the executive branch); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550-51 (1935) (nullifying the Live Poultry Code as an unconstitutional delegation of Congress's law-making authority); see also National Industrial Recovery Act of 1933, Pub. L. No. 67, §§ 8-9, 48 Stat. 195, 199-200 (1933).

20. See generally, May, *supra* note 3, at 20 (“The last time the Supreme Court held a statute unconstitutional under the nondelegation doctrine was in 1935 in *Schechter*.”).

21. 293 U.S. 388 (1935).

22. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 522-23 (1911) (upholding a delegation of rulemaking power to the Secretary of the Agriculture to issue permits for livestock grazing on federal land); *Field v. Clark*, 143 U.S. 649, 700 (1892) (upholding a statute that gave the President the power to impose retaliatory tariffs); *The Brig Aurora*, 11 U.S. 382, 388 (1813) (upholding a trade statute that granted the President the power to impose import restrictions); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 39 (4th ed. 1998) (introducing a history of significant Court decisions that considered delegations of legislative power); cf. *Mistretta v. United States*, 488 U.S. 361, 413-27 (1989) (Scalia, J., dissenting) (arguing that the delegation of legislative power to a quasi-judicial agency should be declared unconstitutional); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting) (disagreeing with the majority's decision to uphold the Occupational Safety and Health Act (OSH Act) despite a broad delegation of rulemaking authority to the Occupational Safety and Health Administration (OSHA)); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-87 (1980) (Rehnquist, J., concurring) (arguing that the Court should have nullified portions of the OSH Act instead of a rule promulgated by OSHA); see generally *supra* notes 7-8 and accompanying text (citing examples of post-1935 case law in which the Court

the Court's rejection of the nondelegation doctrine means that the doctrine is a dead letter.²³ Despite its nonuse before and after 1935, the nondelegation doctrine remains good law, often cited by the federal judiciary²⁴ and analyzed in numerous administrative law casebooks and hornbooks.²⁵

Chief Justice William Howard Taft receives credit for one of the doctrine's best articulations.²⁶ According to Chief Justice Taft, Congress may delegate its lawmaking functions to others only when it "shall lay down by legislative act an *intelligible principle* to which the person or

rejected nondelegation doctrine challenges to federal statutes).

23. See, e.g., FOX, *supra* note 5, at 50 ("Lawyers who now argue that statutes are invalid because they violate the non-delegation doctrine are probably wasting a great deal of their client's time and money."); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 135 (1997) (describing the nondelegation doctrine as "toothless"). But see C. Boyden Gray & Alan Charles Raul, *The Courts Thwart the EPA's Power Grab*, WALL ST. J., May 18, 1999, at A26. Gray and Raul filed briefs on behalf of Senator Orrin Hatch and Representative Tom Bliley in *American Trucking* and stated that:

Contrary to much prevailing opinion among both journalists and lawyers, the nondelegation doctrine is not some arcane, obscure and benighted legal relic of the pre-New Deal era. The doctrine has been alive and well, serving primarily as a canon of judicial construction to save otherwise overly broad statutory grants or agency claims of legislative authority from being held unconstitutional.

Id.

24. See *supra* notes 7-8, 22 and accompanying text; *infra* notes 42-45 and accompanying text (noting various federal cases decided before and after 1935 that considered nondelegation doctrine challenges to federal laws).

25. See *supra* note 23 and accompanying text (providing a sample of legal commentators' opinions concerning the status of the nondelegation doctrine in present day constitutional jurisprudence); see also ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW Ch. 1 (1992) (tracing the evolution of the federal judiciary's treatment of the nondelegation doctrine); BREYER, *supra* note 22, at 39-49; RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS §§ 3.4-3.4.4, at 47-56 (2d ed. 1992) (outlining Supreme Court case law pertaining to the nondelegation doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.14, at 56-57 (2d ed. 1991) (addressing congressionally-prescribed standards and the need for agencies to comply with such standards); 1 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 3.03, at 66-76 (1999) (reviewing the Supreme Court's handling of the nondelegation doctrine); see generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 40 (1993) ("[T]he Court never explicitly reversed its 1935 decisions and it continued to articulate essentially the same verbal formulae defining the scope of permissible delegation.").

26. See *Clinton v. City of New York*, 524 U.S. 417, 484 (1998) (Breyer, J., dissenting) (regarding Chief Justice Taft's statement in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), as a "more familiar" articulation of the nondelegation doctrine); U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 76 ("The current formulation of the rule [was] that laid down by Chief Justice Taft in 1928.").

body authorized to [act] . . . is directed to conform."²⁷ Central to the development of this doctrine is the constitutional doctrine of separation of powers, which allocates lawmaking power to the legislative branch, law-executing power to the executive branch, and law-interpreting power to the judicial branch.²⁸ Chief Justice Taft cautioned, however, that the separation of powers doctrine should not be followed too literally, because all three branches are "co-ordinate parts of one government."²⁹ Each branch, in carrying out its responsibilities, may perform certain tasks associated with the other two branches "in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch."³⁰ In order to permit a delegation, the Chief Justice wrote, "the extent and character of [the delegation] must be fixed according to common sense and the inherent necessities of the governmental co-ordination."³¹

The nondelegation doctrine dates back to the seventeenth century when John Locke, in his *Second Treatise on Government*,³² borrowed the

27. *J.W. Hampton*, 276 U.S. at 409.

28. See U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 70-71 (explaining the origins of the nondelegation doctrine). Separation of powers is defined as "[t]he division of governmental authority into three branches of government . . . each with specified duties on which neither of the other branches can encroach[.]" BLACK'S LAW DICTIONARY 572 (Pocket ed. 1996). The Framers of the Constitution considered the division of three separate and distinct branches as "essential to the preservation of liberty" since each branch serves as a check on the power of the other two. THE FEDERALIST NO. 51, at 159 (James Madison) (Roy P. Fairchild ed., 2d ed. 1966); see J.A. CORRY, ELEMENTS OF DEMOCRATIC GOVERNMENT 25-26, 33-37 (1947) (exploring the origins and importance of the separation of powers doctrine). In *J.W. Hampton*, Chief Justice Taft explained the importance of the nondelegation doctrine in upholding the integrity of the separation of powers principle:

The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.

J.W. Hampton, 276 U.S. at 406.

29. *J.W. Hampton*, 276 U.S. at 406.

30. *Id.*

31. *Id.*

32. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 79 (Prometheus Books 1986) (1691) ("The legislative [branch] cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it can-

maxim “delegatus non potest delegare”³³ from agency law and applied it to the study of government.³⁴ In 1825, the Supreme Court first recognized the doctrine as a legitimate constitutional principle when Chief Justice Marshall, writing for the majority in *Wayman v. Southard*,³⁵ set boundaries for the types of delegations that the Constitution permitted.³⁶

In *Wayman*, the Court addressed whether Congress impermissibly delegated to the federal judiciary the power to establish rules of practice within the federal court system.³⁷ In upholding Congress’s delegation, Chief Justice Marshall wrote that “[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”³⁸

Chief Justice Marshall conceded that “[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself[,] from those of less interest,” which do not.³⁹ Chief Justice Marshall concluded, however, that when Congress decides to delegate its responsibilities, it must first establish general provisions to guide “those who are to act under such general provisions to *fill up the details*.”⁴⁰ In *Wayman*, the Court noted that although some delegations are appropriate, perhaps even necessary for the proper functioning of the federal government, the Court’s approval of such delegations is contingent upon Congress retaining its primary responsibility of making law.⁴¹

not pass it over to others.”).

33. BLACK’S LAW DICTIONARY 347 (2d ed. 1910) (translating the phrase as “[a] delegate cannot delegate”).

34. See U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 70. (expounding on the origins of the nondelegation doctrine and noting that John Locke applied the doctrine “as a principle of political science”).

35. 23 U.S. 1 (1825).

36. See *id.* at 42-43 (declaring that Congress may delegate to the executive and judicial branches “powers which are strictly and exclusively legislative”). The Court further stated that “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.” *Id.* at 43; see also U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 71-72 (discussing permissible congressional delegations).

37. *Wayman*, 23 U.S. at 21.

38. *Id.* at 42-43.

39. *Id.* at 43.

40. *Id.* (emphasis added)

41. *Id.* at 46-47 (declaring Congress’s delegation of authority to federal courts as appropriate); see also FOX, *supra* note 5, at 32 (noting that Chief Justice Marshall recognized the proposition that an effective federal government requires a certain amount of delega-

After *Wayman*, the Court shielded numerous statutes from delegation attacks, especially when the delegated duties were mainly fact-finding in nature.⁴² The Court upheld these statutes after it found that Congress provided the executive branch with either “general rules,”⁴³ a “primary standard,”⁴⁴ or a “contingency”⁴⁵ as a guide to fulfilling its responsibilities.⁴⁶ The delegations that the Court upheld, however, rarely applied to the conduct of private persons or the implementation of federal domestic policy.⁴⁷ Instead, the delegations usually affected an agency’s management of public property⁴⁸ or the President’s international policy prerogatives.⁴⁹ These delegations generally did not involve the large-scale regu-

tion); *AMAN & MAYTON*, *supra* note 25, at 16 n.1 (observing that although early Court decisions consistently upheld delegations of legislative authority, the approvals “were contingent on Congress retaining a primary legislative power”).

42. See, e.g., *Field v. Clark*, 143 U.S. 649, 692-93 (1892) (upholding the President’s power to impose retaliatory tariffs on imports from countries that imposed duties on American goods); see generally, e.g., *The Brig Aurora*, 11 U.S. 382 (1813) (upholding the President’s authority to revive expired tariffs against Britain and France upon his determination that these two countries violated a neutral commerce statute). In *Field*, the Court reasoned that Congress delegated to the President only the power to ascertain facts—whether foreign governments imposed duties on American exports—rather than legislative power. *Field*, 143 U.S. at 692-93.

43. *Interstate Commerce Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 215 (1912) (finding that Congress’s provision of “general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred” did not constitute a delegation of legislative authority to the Interstate Commerce Commission).

44. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) (“Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the ‘power to fill up the details’ by prescribing administrative rules and regulations.”); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (finding that the Tea Inspection Act, which allowed the Secretary of Treasury to ban the importation of certain kinds of tea, did not constitute a delegation of legislative power because of a “primary standard” that bestowed upon the Secretary “the mere executive duty to effectuate the legislative policy declared in the statute”).

45. *The Brig Aurora*, 11 U.S. at 386 (finding that Congress properly delegated to the President power to impose retaliatory tariffs because the power depended on a “contingency”).

46. See *FOX*, *supra* note 5, at 33-34 (discussing the early history of the nondelegation doctrine).

47. See *AMAN & MAYTON*, *supra* note 25, at 16 (finding the Court approved delegations prior to the New Deal that “did not much involve private conduct within the domestic sphere[,]” but instead involved “matters such as presidential authority in foreign affairs or agency management of public property”).

48. See *United States v. Grimaud*, 220 U.S. 506, 522-23 (1911) (upholding a delegation of authority to the Secretary of Agriculture to proscribe rules governing the private use of federally-owned forest land).

49. See *supra* note 42 and accompanying text (providing examples of two cases in which the Court upheld delegations granting the President broad discretionary power to

lation of commercial industries.⁵⁰

Such was the case in *J.W. Hampton, Jr. & Co. v. United States*,⁵¹ in which Chief Justice Taft, writing for the majority, articulated the modern standard governing delegation.⁵² At issue was whether Congress could grant to the President the power to revise the tariff duties for certain imports whenever the President determined it was necessary “to equalize foreign and domestic competition in the markets of the United States.”⁵³ The Chief Justice declared that Congress may delegate such power to the President as long as there is an “intelligible principle” set out in the enabling statute to help guide the President in his decisions.⁵⁴ The Court found such a principle because the statute authorized the President to revise tariff duties only when necessary to equalize the cost of production among the United States and its foreign competitors.⁵⁵

The term “intelligible principle” has carried on to the present day and represents the current formulation of the rule.⁵⁶ The Court endorsed the “intelligible principle” standard in 1935, when, in two separate instances, it found an unconstitutional delegation of legislative power.⁵⁷

conduct foreign policy); *see also* *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 401, 412-13 (1928) (upholding the power delegated to the President to adjust duties on tariffs as constitutional); *Buttfield*, 192 U.S. at 496 (upholding the Secretary of Treasury’s power to regulate the importation of tea).

50. *See* AMAN & MAYTON, *supra* note 25, at 16 (distinguishing nineteenth century cases and early twentieth century cases from those cases decided in 1935 and beyond). Delegations before the New Deal era “did not generally pertain to broad-scale agency regulation of domestic conduct.” *Id.*

51. 276 U.S. 394 (1928).

52. *Id.* at 409; *see also supra* notes 26-31 and accompanying text (describing Chief Justice Taft’s articulation of the nondelegation doctrine).

53. *J.W. Hampton*, 276 U.S. at 411 (discussing the Tariff Act of 1922).

54. *Id.* at 409 (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

55. *See id.* The Court further reasoned that it would be impossible for Congress to operate a tariff system that requires the constant adjustment of duty rates. *See id.* at 407. Specifically, the Court stated that:

[C]ommon sense requires that in the fixing of such rates Congress may provide a Commission . . . to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory.

Id. at 407-08.

56. *See* U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 76 (describing the evolution of the nondelegation doctrine and attributing its current formulation to Chief Justice Taft).

57. *See id.* at 75-76 (describing how the Court applied the “intelligible principle” rule to invalidate the two federal programs in *A.L.A. Schechter Poultry Corp. v. United States*,

In *Panama Refining*, the first of these two cases, the Court found that Congress's delegation of legislative power to the President was too broad and unrestricted.⁵⁸ The Court, in an eight-to-one decision, invalidated the President's authority under section 9(c) of the NIRA⁵⁹ to prohibit the interstate and foreign shipment of petroleum in excess of state quotas—so called “hot oil”—because no standards existed to guide the President's exercise of discretion.⁶⁰ Congress apparently failed to articulate when and under what circumstances the President should act to block the shipment of “hot oil.”⁶¹ The Court pointed to an executive order that President Franklin D. Roosevelt issued to implement section 9(c)'s delegation of authority to the Secretary of Interior, who was empowered to create agencies and promulgate rules necessary for the vigorous enforcement of the Act's operative provisions.⁶² Justice Benjamin Cardozo, the sole dissenter, disagreed by finding an “intelligible principle” in section 1 of the NIRA, which listed numerous purposes for the many sections of the statute, including the elimination of unfair trade practices.⁶³

Five months after *Panama Refining*, the Court ruled unanimously in *Schechter* that section 3 of the NIRA, which provided the President broad powers to regulate labor conditions and establish price standards and trade practices for various industries, delegated too much legislative power to the executive branch.⁶⁴ In *Schechter*, Justice Cardozo agreed

295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)); see also LOCKHART ET AL., *supra* note 2, at 182 (reiterating that the Court has not invalidated federal legislation under the nondelegation doctrine since 1935).

58. *Panama Refining*, 293 U.S. at 433.

59. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, § 9(c), 48 Stat. 195, 200 (1933) (codified as amended at 15 U.S.C. § 709(c) (1935)) (invalidated 1935).

60. See *Panama Refining*, 293 U.S. at 430-31. The Court admonished Congress for failing to establish an intelligible principle to guide the Executive's discretion:

As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, and has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

Id. at 430.

61. U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 75 (reasoning that the failure to set such standards resulted in an unconstitutionally excessive and unconfined delegation of legislative power).

62. See *Panama Refining*, 293 U.S. at 407 & n.2 (quoting Executive Order No. 6204 (July 14, 1933)).

63. See *id.* at 435-36 (Cardozo, J., dissenting).

64. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (holding that the President's power under section 3 of the NIRA to prescribe or approve the regulation of various industries, without standards to channel his discretion, amounted to an invalid exercise of legislative authority).

with the Court⁶⁵ when it found an absence of standards to guide the President's discretion.⁶⁶ The Court declared it unconstitutional for Congress to "delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed" to regulate a domestic industry.⁶⁷

Justice Cardozo concurred and concluded that Congress's delegation was "not canalized within banks that [kept] it from overflowing."⁶⁸ Justice Cardozo referred to section 3 as "delegation running riot."⁶⁹ Justice Cardozo believed the critical difference between *Panama Refining* and *Schechter* stemmed from the fact that Congress did not confine section 3 "to any single act [or] to any class or group of acts identified or described by reference to a standard."⁷⁰ Section 3 gave the President broad power to identify impediments to the national economic recovery, and upon discovery, to exercise equally broad discretion in implementing solutions without ever seeking Congress's permission.⁷¹

By 1943, eight years after *Schechter*, President Roosevelt, by appointing more activist justices, changed the makeup of the Court.⁷² In 1936, the new justices began to change the political dynamics of the Court as evidenced by a line of decisions that expanded the use of the Commerce Clause⁷³ in regulating economic areas that the federal government never previously regulated.⁷⁴

65. *Id.* at 551-52 (Cardozo, J., concurring) (distinguishing the instant case from the NIRA provisions at issue in *Panama Refining*, which provided the President with unlimited power to investigate and remove impediments to fair competition in trades and industries).

66. *Id.* (Cardozo, J., concurring). As Justice Cardozo did in *Panama Refining*, the Court in *Schechter* searched the "Declaration of Policy" in section 1 of the NIRA for language that sufficiently guided the President's discretion to approve or prescribe industry codes. *Id.* at 534-39. The Court found that section 1's "preface of generalities" was inadequate in properly steering the President's exercise of rulemaking authority. *Id.* at 537.

67. *Id.* at 537-38.

68. *Id.* at 551 (Cardozo, J., concurring).

69. *Id.* at 553 (Cardozo, J., concurring).

70. *Id.* at 551 (Cardozo, J., concurring).

71. *See id.* at 538.

72. *See* LOCKHART ET AL., *supra* note 2, at 1552 (listing these Justices and the dates of their Senate confirmations). President Roosevelt appointed nine Supreme Court Justices between 1937 and 1943. *See id.*

73. U.S. CONST. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . [to] regulate Commerce . . . among the several States.").

74. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding the NLRB's authority under the National Labor Relations Act to prohibit "any unfair labor practices"); *see also* Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 677, 680-82 (1946) (expounding on the monumental

In one of those cases, *National Broadcasting Co. v. United States*,⁷⁵ the so-called *Networks Case*,⁷⁶ the Court upheld Congress's broad delegation of rulemaking power to the Federal Communication Commission (FCC).⁷⁷ Justice Felix Frankfurter, recently appointed at the time and a strong believer in the national government's ability to alleviate societal ills,⁷⁸ wrote for the majority in supporting the FCC's authority to develop broadcast licensing policies.⁷⁹ The FCC cited section 303 of the Communications Act of 1934 as originally providing the general authority to regulate the broadcast industry "as public convenience, interest, or necessity requires[.]"⁸⁰ The Court supported this seemingly open-ended delegation based on the pragmatic assumption that the "facilities of radio" may not be put to "the best practicable service to the community" without federal regulation.⁸¹ In other words, progress demanded that the FCC take decisive action on behalf of the nation, even if that required substantive policymaking.⁸²

By the late 1970s, the nondelegation doctrine was close to becoming, if

impact of the *Jones & Laughlin* decision on President Roosevelt's national economic recovery program and subsequent Court decisions that generally affirmed Congress's claims of authority to regulate industry through the Commerce Clause).

75. 319 U.S. 190 (1943) (*Networks Case*).

76. See AMAN & MAYTON, *supra* note 25, at 19.

77. See *Networks Case*, 319 U.S. at 224 (concluding that the FCC had the authority to regulate and overturn contractual agreements made by network companies and their local broadcasting stations).

78. See AMAN & MAYTON, *supra* note 25, at 19 & n.22 (suggesting that Justice Frankfurter believed "the best means of resolving social problems was not to leave them to private solutions but to instead commit them to 'official national action'" (citing FELIX FRANKFURTER, *LAWMAKING AND POLITICS* 308 (A. Macleish & E. Pritchard, Jr. eds., 1962))).

79. See *Networks Case*, 319 U.S. at 225-26 (supporting the FCC's claim of regulatory authority and quoting *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25 (1932), which held that "[t]he purpose of the Act, the requirements it imposes, and the context of the public interest provision" provide standards that guided the FCC's regulation of broadcast licensing arrangements).

80. *Id.* at 220.

81. *Id.* at 216 (quoting the majority opinion in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)). Justice Frankfurter may have quoted *Sanders Bros.* out of context to justify upholding such a broad delegation. See AMAN & MAYTON, *supra* note 25, at 19-20 nn.21-22, 21 nn.28-31 (arguing that Justice Frankfurter cited the opinion out of context to further his view that society's ills are best solved by national government action).

82. See AMAN & MAYTON, *supra* note 25, at 19, 21-22 (propounding that Justice Frankfurter believed aggressive federal action should resolve national problems and noting that the *Networks Case* may be the only instance where the Court approved an "open-ended delegation" of rulemaking authority to an agency).

it had not already, an antiquated constitutional principle.⁸³ A long line of Court cases staved off nondelegation attacks by following the logic used in the *Networks Case*.⁸⁴ By the early 1980s, however, the delegation doctrine began to resurface.⁸⁵ In two separate opinions, then Associate Justice William Rehnquist suggested that the Court revive the doctrine as an attempt to induce Congress to make better law and enact fewer vague enabling statutes.⁸⁶ Justice Rehnquist first articulated this view in *Industrial Union Department v. American Petroleum Institute*,⁸⁷ the so-called

83. See FOX, *supra* note 5, at 38 (“Between 1936 and the late 1970s, the non-delegation doctrine was certainly a dormant, if not a dead, issue.”). For nearly forty years, the Court consistently upheld congressional delegations of rulemaking authority to federal agencies, despite an occasional concern that a statute may be too vague. See *id.*

84. See, e.g., *National Cable Television Ass’n v. United States*, 415 U.S. 336, 341-42 (1974) (upholding the FCC’s authority to impose surcharges on community antenna television systems and declaring that the primary purpose of the FCC “is to safeguard the public interest in the broadcasting activities of members of the industry”); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (holding that the statute that authorized the Federal Home Loan Bank Board to regulate building and loan associations did not unconstitutionally delegate legislative functions because regulation of the banking industry is a long-established government practice necessary to protect the public interest); see also, e.g., *AMAN & MAYTON*, *supra* note 25, at 22 (observing that between the mid-1930s and the late 1970s, the Court approved a number of delegations “while disapproving of none”). It should be noted, however, that the Court has probably never considered a delegation as broad as the one endorsed in the *Networks Case*. See *id.* (“[T]he *Networks Case* seems to be the only case where the Supreme Court has approved (or, more accurately, helped construct) an entirely open-ended delegation.”).

85. See FOX, *supra* note 5, at 38 (explaining when and how the nondelegation doctrine began to rematerialize in Court opinions).

86. See *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (*Benzene*) (Rehnquist, J., concurring). The author recognizes that Chief Justice Rehnquist served as an Associate Justice at the time of the *Benzene* decision. The author will refer to Chief Justice Rehnquist as “Justice Rehnquist” throughout the remainder of this Note. Justice Rehnquist urged the Court to reinvigorate the nondelegation doctrine as a means of “ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators.” *Id.* at 686-87 (Rehnquist, J., concurring). Justice Rehnquist reiterated his call for the revival of the nondelegation doctrine in *American Textile Manufacturers Institute, Inc. v. Donovan*, partially as a means to provoke Congress into making critical policy decisions instead of abdicating its responsibilities to the agencies. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting); see also *supra* note 22 and accompanying text (comparing the Court’s historic treatment of the nondelegation doctrine with relatively recent dissenting opinions by Supreme Court Justices, including Justice Rehnquist); see generally FOX, *supra* note 5, at 38 (explaining Justice Rehnquist’s concurring opinion in *Benzene* in greater depth); BREYER ET AL., *supra* note 22, at 65 (explaining Justice Rehnquist’s logic in *Benzene* and *Donovan* as stating that a revival of the nondelegation doctrine would encourage more congressional accountability).

87. 448 U.S. 607 (1980).

Benzene case.⁸⁸

In *Benzene*, the Court refused to strictly apply the nondelegation doctrine to nullify portions of the Occupational Safety and Health Act (OSH Act).⁸⁹ Although the Court held that Congress must provide some standards in its enabling statutes in order to limit the unbridled discretion of executive agencies,⁹⁰ the majority struck down only a regulation issued by the Occupational Safety and Health Administration (OSHA) instead of the statute itself.⁹¹ The OSH Act delegated to OSHA powers to "assure[], to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity."⁹² OSHA used this authority to promulgate a regulation requiring companies "to limit benzene in the workplace to no more than one part benzene in one million parts of air."⁹³ Industry groups challenged the rule as arbitrary, excessively costly for compliance, and beyond OSHA's delegated authority under the OSH Act.⁹⁴

A majority of the Court agreed with the industry⁹⁵ and overturned the rule.⁹⁶ Only Justice Rehnquist opted to nullify the Act.⁹⁷ Concurring, the

88. See *AMAN & MAYTON*, *supra* note 25, at 24 & n.43 (referring to the case as *Benzene*); see also *FOX*, *supra* note 5, at 38 (commenting on how Justice Rehnquist's concurring opinion in *Benzene* shocked the legal community).

89. *Benzene*, 448 U.S. at 646 (warning that the OSH Act, codified at 29 U.S.C. § 651 (1994), came close to providing a "sweeping delegation of legislative power" that the Court could not have ignored (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935))).

90. See *Benzene*, 448 U.S. at 645-46 (warning that the Court could have found sections 3(8) and 6(b)(5) of the OSH Act unconstitutional under the nondelegation doctrine if the Administration had successfully argued that these sections provided OSHA with the broad authority to regulate industry).

91. See *id.* at 614-15, 645-46 (construing the statute to avoid finding an open-ended delegation); see *infra* notes 100-103 and accompanying text (explaining why the Court decided to construe the OSH Act narrowly to avoid finding a delegation violation).

92. 29 U.S.C. § 655(b)(5) (emphasis added).

93. *AMAN & MAYTON*, *supra*, note 25, at 24.

94. See *Benzene*, 448 U.S. at 628-29 (recognizing the high compliance costs); see also *AMAN & MAYTON*, *supra* note 25, at 24 (summarizing one argument against the legality of OSHA's benzene rule, which contended that attaining the prescribed level of benzene would result in disproportionately high costs for the industry).

95. See *Benzene*, 448 U.S. at 645 (explaining that "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit").

96. See *id.* at 614-15 (5-4 decision).

97. See *id.* at 686 (Rehnquist, J., concurring) ("We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.").

future Chief Justice expressed concern about the Act's "to the extent feasible" language, which he interpreted as an open-ended invitation for OSHA to legislate, resulting in an unconstitutional delegation of Article I power.⁹⁸ Justice Rehnquist joined the plurality of four⁹⁹ who found OSHA's authority to regulate benzene canalized by other provisions of the OSH Act, including the requirement that OSHA find "a significant health risk" to workers.¹⁰⁰ Thus, because OSHA failed to cite a significant risk of harm from such low levels of benzene, the Court invalidated the regulation instead of the statute.¹⁰¹ The Court ultimately avoided the nondelegation issue by construing the OSH Act to find an intelligible principle within its ambiguous language.¹⁰² This finding limited OSHA's discretion in promulgating expansive rules.¹⁰³

98. *Id.* at 687-88 (Rehnquist, J., concurring).

99. *See id.* at 611. (Chief Justice Burger, as well as Justices Stewart and Powell, joined Justice Stevens, who announced the judgment of the Court).

100. *Id.* at 614-15 (finding that section 3(8) of the OSH Act requires the Secretary of Labor "to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the workplace"); *see also id.* at 646 (concluding that section 3(8) adequately confines OSHA's discretion to implement health and safety standards in the workplace).

101. *See id.* at 646. According to Justice Stevens,

In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3(8) and 6(b)(5)

....

If the Government were correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

Id. at 645-46 (citations omitted).

102. *See id.* at 646. The Court interpreted section 3(8) of the OSH Act to require "a threshold finding . . . that significant risks are present." *Id.* at 642; *see also* *American Trucking Ass'n v. EPA*, 195 F.3d 4, 8 (D.C. Cir. 1999) (analyzing the *Benzene* decision and comparing it to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257); *infra* note 189 and accompanying text (explaining that the D.C. Circuit in *American Trucking* announced that *Chevron* now requires agencies, not the courts, to find an intelligible principle in an ambiguous statute).

103. *See* AMAN & MAYTON, *supra* note 25, at 25 (analyzing the plurality's logic in upholding the OSH Act but striking down the benzene regulation). Professors Aman and Mayton provide a useful analysis of the plurality's logic:

This statutory interpretation was shaped by the delegation doctrine, the doctrine operating as a canon of interpretation. The plurality explained that if the Act did not "requir[e] that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way,

B. D.C. Circuit's Treatment of the Nondelegation Doctrine

The seeds of the D.C. Circuit's recent holding in *American Trucking* can be traced to its 1991 *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. OSHA*¹⁰⁴ decision, better known as *Lockout/Tagout I*.¹⁰⁵ In *Lockout/Tagout I*, the court regarded an OSHA regulation, which governed the "Control of Hazardous Energy Sources (Lockout/Tagout),"¹⁰⁶ as "so broad as to be unreasonable."¹⁰⁷ Unlike the Court in *Benzene*, the D.C. Circuit complained less of OSHA's broad use of the delegated authority and more about OSHA's inconsistent and variable application of its authority.¹⁰⁸ According to the court, the cost of complying with the rule would vary from firm to firm and from industry to industry.¹⁰⁹ The court argued that the rule "would give the executive branch untrammelled power to dictate the vitality and even survival of whatever segments of American business it might choose."¹¹⁰ Instead of striking down the regulation as an unconstitutional delegation, the court remanded the rule back to OSHA for reformulation in order to comply with the nondelegation doctrine.¹¹¹ The

the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional."

Id. (quoting *Benzene*, 448 U.S. at 646); see also BREYER ET AL., *supra* note 22, at 65 & n.4 (finding that the Court specifically construed the OSH Act to avoid finding a violation of the nondelegation doctrine); Jennifer Cohen, Note, *The Scope of the Nondelegation Doctrine As Applied to OSHA's "Control of Hazardous Energy Sources (Lockout/Tagout)" Regulation*, 64 GEO. WASH. L. REV. 1139, 1142 (1996) (exploring the Court's application of the nondelegation doctrine before its decision in *International Union v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994)).

104. 938 F.2d 1310 (D.C. Cir. 1991) (*Lockout/Tagout I*).

105. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1037 (D.C. Cir. 1999) (comparing the claim of regulatory authority in *American Trucking* with the authority asserted in *Lockout/Tagout I*, modified, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257); see also *News from the Circuits*, 24 ADMIN. & REG. L. NEWS. 6, 6 (1999) (asserting the D.C. Circuit's *American Trucking* decision closely followed the court's logic in *Lockout/Tagout I*).

106. Control of Hazardous Energy Sources, 54 Fed. Reg. 36,644 (1989) (codified as 29 C.F.R. § 1910.147 (1995)). Lockout and tagout are two safety procedures designed to protect workers from injuries caused by electrical tools and industrial machinery. See *Lockout/Tagout I*, 938 F.2d. at 1312.

107. *Lockout/Tagout I*, 938 F.2d. at 1313.

108. See *id.* at 1318 (declaring an agency is not free to single out a particular company for standards embodying strict compliance while applying a lesser standard for similar situated companies).

109. See *id.* ("[T]he power to vary the stringency of the standard is the power to decide which firms will live and which will die.").

110. *Id.*

111. See *id.* at 1313 (remanding the rule on Lockout/Tagout to the Secretary of Labor

court directed OSHA to cite a principle within the OSH Act to confine its discretion.¹¹² In addition, the court took the additional step of suggesting that the agency use a cost-benefit analysis to modify the rule.¹¹³ In a separate concurrence, Judge Stephen F. Williams argued that OSHA's use of a cost-benefit analysis would likely produce a rule that is less stringent, but not necessarily less effective in enhancing workplace safety.¹¹⁴

In 1994, the D.C. Circuit eventually upheld a revised rule mandating lockout/tagout safety procedures in *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. OSHA*.¹¹⁵ In response to the court's decree, OSHA supported its earlier rule by issuing a supplemental statement of reasons in 1993.¹¹⁶ Thus, four years after its original *Lockout/Tagout* decision, the court concluded that OSHA provided adequate justifications for its new industry-wide standards and lockout preferences and upheld the entire modified rule.¹¹⁷

The D.C. Circuit's *Lockout/Tagout I* decision departed significantly

to develop a more reasonable interpretation of the OSH Act).

112. See *id.* at 1313, 1325.

113. See *id.* at 1320-21 (holding that OSHA's use of a cost-benefit analysis is a "permissible interpretation" of the OSH Act). "[C]ost-benefit analysis entails only a systematic weighing of pros and cons." *Id.* at 1321.

114. See *id.* at 1326 (Williams, J., concurring) (arguing that a cost-benefit analysis could impose less burdensome requirements on industries and simultaneously protect the health and well being of their employees). Judge Williams wrote the majority opinion of the court, as well as a separate concurrence. See *id.* at 1312, 1326.

115. 37 F.3d 665, 668 (D.C. Cir. 1994) (*Lockout/Tagout II*) (decreeing OSHA's reinterpretation of its statutory authority complies with the nondelegation doctrine).

116. See Control of Hazardous Energy Sources (Lockout/Tagout), 58 Fed. Reg. 16,612 (1993) (providing a "supplemental statement of reasons" for the issuance of its rule governing lockout/tagout procedures). The United States Court of Appeals for the D.C. Circuit summarized OSHA's supplement as follows:

The agency points primarily to several principles—most of them not derived from § 3(8) itself but from other sections, including some not directly applicable, such as § 6(b)(5)—that constrain its discretion in choosing a safety standard. The agency must find that (1) "the standard will substantially reduce a significant risk of material harm"; (2) & (3) compliance will be economically and technologically feasible; and (4) the standard "employs the most cost-effective protective measures". In addition, it must (5) for any standard differing from an existing national consensus standard, publish its reasons why its standard would better effectuate the purposes of the Act; and (6) support its choice of standard with evidence in the rulemaking record and explain any inconsistency with prior agency practice.

Lockout/Tagout II, 37 F.3d at 668 (quoting 58 Fed. Reg. at 16,614) (citations omitted).

117. *Lockout/Tagout II*, 37 F.3d at 669 (holding that OSHA satisfied the nondelegation doctrine when it construed its enabling statute as the governing authority to establish industry safety); see also Cohen, *supra* note 103, at 1143 (analyzing the *Lockout/Tagout II* decision).

from some earlier district court holdings, including *Amalgamated Meat Cutters & Butcher Workmen v. Connally*,¹¹⁸ which upheld the Economic Stabilization Act of 1970.¹¹⁹ In *Amalgamated Meat*, the District Court for the District of Columbia held that the statute sufficiently established a standard to guide the President's discretion as it prescribed a norm of stabilization¹²⁰ and included a specific time limit within which the President could exercise authority to battle inflation.¹²¹ The district court warned, however, that the President and his administration should set some administrative standards to guide the President's discretion.¹²²

II. THE D.C. CIRCUIT ADDS TEETH TO THE NONDELEGATION DOCTRINE IN *AMERICAN TRUCKING ASSOCIATIONS V. EPA*

In *American Trucking Ass'ns v. EPA*,¹²³ a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit declared as unconstitutional new EPA regulations that established strict national ambient air quality standards (NAAQS) for many communities found to have unacceptable levels of smog and soot.¹²⁴ By a two-to-one majority, the D.C. Circuit held that the EPA construed the pertinent Clean Air Act provisions "so

118. 337 F. Supp. 737 (D.D.C. 1971).

119. 12 U.S.C. § 1904 (1988). The Economic Stabilization Act, an anti-inflation statute, granted the President the broad power to freeze wages and prices nationally. See *Amalgamated Meat*, 337 F. Supp. at 763. According to the three-judge district court, led by D.C. Circuit Judge Harold Leventhal, "the extremist pattern then before the Court [in *Schechter*] cannot fairly be analogized to the anti-inflation statute, limited in life and passed in a context of experiences with similar legislation, that is before us for consideration." *Id.* at 742-743, 763.

120. See *Amalgamated Meat*, 337 F. Supp. at 757-58 (finding the statute provides "a standard of broad fairness and avoid[s] gross inequity" that limits the President's control over the domestic economy).

121. See *id.* at 754 (citing the limited time frame—only six months with two extensions of three-and-one-half months and two months, respectively—for the President to use his stabilization authority under the Act).

122. See *id.* at 763 (stating clearly that the President is limited in his discretion because "[t]he presumption must be that Congress, in vesting power in the President, contemplated only such further delegation as would be consistent with law"). Limits to the President's discretion "includ[ed] the requirement that the orders providing for stabilization be issued on a basis that accords with general fairness and avoids gross inequity, and provide for administration and procedures that are meaningfully consistent with that standard." *Id.* The district court preceded this warning, however, by stating that the federal judiciary would invalidate a statute for an unconstitutional delegation only in "the extremist instance." *Id.* at 762.

123. 175 F.3d 1027, 1057 (D.C. Cir. 1999) (per curiam), modified, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257).

124. See *id.* at 1034; see also Kriz, *supra* note 13, at 2166.

loosely as to render them unconstitutional delegations of legislative power.”¹²⁵ Although the court did not nullify any part of the Clean Air Act or vacate the EPA’s regulations, it declared the new air standards unenforceable and remanded them to the EPA for reformulation.¹²⁶ According to the court, the EPA failed to articulate an “intelligible principle” on which to base its construction of the Clean Air Act in order to limit its discretion in determining the level of intolerable air pollution.¹²⁷ The EPA’s interpretation of the Clean Air Act left the agency “free to pick any point between zero and a hair below the concentrations yielding London’s Killer Fog.”¹²⁸

The majority opinion was divided into four parts.¹²⁹ Judge Stephen Williams wrote Part I, which invalidated the EPA’s rules on ozone and PM standards.¹³⁰ Judge Douglas H. Ginsburg wrote the second part, which rejected the petitioners’ claims that the NAAQS revisions violated several federal statutes, including the National Environmental Policy Act, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act.¹³¹ Judge Ginsburg and Judge Williams wrote the third portion of the decision, which required the EPA to consider the public health benefits of ozone.¹³² Finally, Judge David S. Tatel and Judge Ginsburg co-authored Part IV and concluded that the EPA’s standards concerning a certain type of PM were arbitrary and capricious.¹³³ Judge Tatel also wrote a separate dissenting opinion to Part I, which argued that the majority largely ignored the Supreme Court’s nondelegation doctrine juris-

125. *American Trucking*, 175 F.3d at 1034.

126. *See id.* at 1033 (holding that the EPA when it promulgated its rules under the Clean Air Act, failed to satisfy the nondelegation doctrine). Unlike the Supreme Court in *Benzene*, the court of appeals did not find an intelligible principle within the Clean Air Act and instead ordered the EPA to construe the Act on its own. *See id.* at 1038; *see also infra* note 189 and accompanying text (explaining the role of agency deference in determining whether a statute contains an intelligible principle).

127. *See American Trucking*, 175 F.3d at 1034 (“EPA lacks . . . any determinate criterion for drawing lines [because it] failed to state intelligibly how much is too much.”).

128. *Id.* at 1037.

129. *See id.* at 1033.

130. *See id.* at 1033, 1034-40. Judge Ginsburg joined this part of the opinion. *See id.* at 1033.

131. *See id.* at 1033, 1040-45.

132. *See id.* at 1033, 1045-53. Judge Ginsburg wrote Part III.A and Judge Williams authored Part III.B. *See id.* at 1033. The D.C. Circuit subsequently modified Part III.A of its opinion concerning the power of the EPA to enforce a revised primary and secondary ozone NAAQS. *See American Trucking Ass’ns v. EPA*, 195 F.3d 4, 9-10 (D.C. Cir. 1999), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257).

133. *See id.* at 1033, 1053-55.

prudence when it vacated the EPA's revised air quality standards.¹³⁴

A. *Revising the National Ambient Air Quality Standards (NAAQS) for Ozone*

The Clean Air Act of 1970 requires the EPA to establish, review, and adjust NAAQS periodically for every pollutant that the EPA Administrator identifies to be harmful to public health and welfare.¹³⁵ The Clean Air Act directs the Administrator to identify and set air quality criteria for certain pollutants that "may reasonably be anticipated to endanger public health or welfare."¹³⁶ For each pollutant, the Administrator must establish both a "primary standard"—a concentration level necessary to protect the public health with "an adequate margin of safety"¹³⁷—and a "secondary standard" necessary to protect the public welfare.¹³⁸

In July 1997, the EPA issued two final rules that revised the primary and secondary standards for both ozone and particulate matter (PM).¹³⁹ The revised NAAQS for ozone replaced the previous standard with a tougher one designed to protect against longer exposure periods.¹⁴⁰ The EPA proposed a similarly strict revision of the NAAQS for PM.¹⁴¹ The

134. See *id.* at 1057 (Tatel, J., dissenting) (characterizing the majority's opinion as poorly reasoned in light of a half-century of nondelegation jurisprudence by the federal judiciary).

135. See Clean Air Act §§ 108-09, 42 U.S.C. §§ 7408-09 (1994). Currently, the EPA has NAAQS for six common air pollutants: ozone, carbon monoxide, lead, nitrogen dioxide, sulfur oxides, and particulates. See JOHN-MARK STENSVAAG & CRAIG N. OREN, CLEAN AIR ACT: LAW AND PRACTICE § 2.3 (Supp. 1998).

136. 42 U.S.C. § 7408.

137. *Id.* § 7409(b)(1).

138. *Id.* § 7409(b)(2). The Clean Air Act requires the EPA to promote air quality standards because "the attainment and maintenance of [such standards] in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisites to protect the public health." *Id.* § 7409(b)(1).

139. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (to be codified at 40 C.F.R. pt. 50) [hereinafter *PM Final Rule*]; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50) [hereinafter *Ozone Final Rule*].

140. See *Ozone Final Rule*, 62 Fed. Reg. at 38,859 (explaining that the previous standard of 0.12 parts per million (ppm) one-hour primary ozone was replaced with a standard of 0.08 ppm eight-hour primary).

141. See *PM Final Rule*, 62 Fed. Reg. at 38,652. In its final rule regarding PM, the EPA explained the following changes:

Two new PM_{2.5} standards are added, set at 15 µg/m³, based on the 3-year average of annual arithmetic mean PM_{2.5} concentrations from single or multiple community-oriented monitors, and 65 µg/m³ based on the 3-year average of the 98th percentile of 24-hour PM_{2.5} concentrations at each population-oriented monitor within an area; and the current 24-hour PM₁₀ standard is revised to be based on

EPA claimed that these revised NAAQS would protect 125 million Americans, including thirty-five million children, from breathing in harmful air and would “prevent approximately 15,000-premature deaths, about 350,000-aggravated asthma attacks, and nearly a million cases of significantly decreased lung function in our children.”¹⁴²

Conversely, under these revised rules, many previously unaffected communities throughout the United States would have been classified as an “ozone nonattainment zone.”¹⁴³ An ozone nonattainment zone is a geographic area, generally surrounding an urban center “that persistently fails to meet the NAAQS” for ozone.¹⁴⁴ The EPA’s revised NAAQS would increase the number of nonattainment zones beyond those currently designated in twenty-five states and the District of Columbia.¹⁴⁵ The implementation of an eight-hour ozone standard within both new and existing nonattainment areas would burden industries with expensive

the 99th percentile of 24-hour PM₁₀ concentrations at each monitor within an area.

Id.

142. *EPA’s Clean Air Regulations and Agriculture: Hearing Before the Senate Comm. on Agric., Nutrition and Forestry*, 105th Cong. 15 (1997) (statement of Hon. Carol M. Browner, Administrator, EPA).

143. Douglas E. Cloud & Charles S. Conerly, *Haze of Uncertainty: Recent D.C. Circuit Ruling Delays New EPA Ozone Standards*, LEGAL TIMES, May 24, 1999, at S29 (explaining the practical effects that EPA’s revised NAAQS would impose on small-to-midsize urban areas). The authors suggested that “[m]etropolitan areas as diverse as West Memphis, Ark., Augusta, Ga., Jerseyville, Ill., and Fayetteville, N.C., were likely candidates for the new list of cities with smog problems.” *Id.* Representative John Dingell (D-MI), Ranking Minority Member of the House Committee on Commerce, charged that hundreds of communities would be classified as nonattainment areas under the EPA’s revised ozone NAAQS:

Based on data from EPA and EPA past practices, we can expect at least 540 counties will fail to meet the new ozone standard, and some 280 will fail to meet the fine particle standard. Those areas will then have to identify every source and apply stringent controls and restrictions. EPA, in its own materials on the standards, refers to the “stigmas” of noncompliance and the “burdensome planning requirements and restrictions on growth” that flow from being out of compliance.

The Impact of EPA’s New Air Quality Standards on U.S. Small Manufacturing Jobs and Competitiveness: Hearings Before the Subcomm. on Mfg. & Competitiveness of the Senate Comm. on Commerce, Science & Transp., 105th Cong. 13 (1997) [hereinafter *Testimony of Rep. Dingell*] (testimony of Rep. John Dingell).

144. Cloud & Conerly, *supra* note 143, at S29 (explaining the parameters of ozone nonattainment areas); see also GARY C. BRYNER, BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990 123, 125 (2d ed. 1993) (describing the various categories of ozone nonattainment areas created under Title I of the 1990 amendments to the Clean Air Act of 1970).

145. See Cloud & Conerly, *supra* note 143, at S29 (describing the arguments against the implementation of stricter air quality standards).

and lengthy compliance and permitting programs.¹⁴⁶ For these reasons, various business groups challenged the EPA's regulations and filed petitions for review with the D.C. Circuit Court of Appeals,¹⁴⁷ which has jurisdiction over federal regulatory cases.¹⁴⁸

146. See *id.* Estimates vary on the anticipated costs to the industry in complying with the revised NAAQS. *The Washington Times* published an editorial the day after the D.C. Circuit's decision, suggesting that the revised PM and ozone NAAQS would have subjected certain areas to "strict new emissions controls on automobiles, industry and business at costs of \$60 billion annually or more, according to the [P]resident's own Council of Economic Advisers." *EPA, Lost in the Ozone Again*, WASH. TIMES, May 19, 1999, at A18. Congressman John Dingell, who testified before a Senate panel reviewing the promulgated clean air rules, supported this conclusion when he stated:

Mr. Chairman, no one has claimed it will be cheap to implement the new standards. There has been a lot of criticism of EPA's estimates, even by the President's own Council of Economic Advisors. While the EPA's Regulatory Impact Analysis estimates compliance costs at \$47.3 billion per year, the Council estimates the cost of full compliance just for ozone to be as much as \$60 billion per year.

A study completed this summer by the WEFA Group (formerly the Wharton Econometrics Forecasting Association) took into account many of the analyses and associated data which have been conducted in the last nine months. This study concluded that national compliance costs of \$90-150 billion per year are reasonable.

Testimony of Rep. Dingell, supra note 143, at 13. The *Los Angeles Times*, however, reported that "government authorities said [the revised NAAQS for ozone] would cost businesses and local governments nearly \$10 billion to comply with the new rules by 2010." Robert L. Jackson & James Gerstenzang, *Air Quality Standards Rejected by Appeals Court*, L.A. TIMES, May 15, 1999, at A1; see also Ben Lieberman, *Clearing the Air on Regulatory Excess*, WASH. TIMES, May 19, 1999, at A16 (claiming the revised NAAQS for ozone "would impose annual costs in excess of benefits—by as much as \$8 billion dollars under one set of assumptions"); *Democracy I, Tyranny 0*, DET. NEWS, May 18, 1999, at 10A (editorializing that the cost of complying with the EPA rule was estimated at \$5 billion, in addition to "the \$35 billion annual cost the Clean Air Act already imposes").

147. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1031-33 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999) (indicating that the industry groups that challenged the regulations included the Small Business Survival Committee, the National Association of Manufacturers, the American Petroleum Institute, and the American Trucking Associations), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257).

148. See Clean Air Act, 42 U.S.C. § 7607 (1994) (providing the D.C. Circuit with exclusive jurisdiction over final regulatory actions by the EPA concerning emission standards, provided that such actions are "based on a determination of nationwide scope or effect"); see also *Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) (stating that "exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage" of the court's expertise concerning the regulatory actions it reviews); Kriz, *supra* note 13, at 2167 (stating that the D.C. Circuit has "primary jurisdiction over federal regulatory cases").

B. Recognizing the Limits to Rulemaking

In *American Trucking*, the D.C. Circuit held, in part,¹⁴⁹ that the construction of the Clean Air Act, on which the EPA relied to refashion its ozone and PM NAAQS, was so broad and unconfined as to render the EPA's authority an unconstitutional delegation of legislative power.¹⁵⁰ In remanding the revised NAAQS to the EPA for the development of a narrower construction of the Clean Air Act, the court not only breathed new life into a scarcely used constitutional doctrine,¹⁵¹ but cast a thick cloud over the constitutionality of Congress's future delegations of broad rulemaking authority.¹⁵²

149. *American Trucking*, 175 F.3d at 1034. Another significant holding of *American Trucking* focused on the 1990 amendments to the Clean Air Act. *See id.* The court precluded the EPA from enforcing its revised primary NAAQS for ozone because, as currently written, they do not follow the mechanisms prescribed in the 1990 amendments. *See id.* at 1046. Although the 1990 amendments did not alter sections 108 and 109, they did set forth five different classifications of nonattainment areas, all measured under the 0.12 ppm, 1-hour primary ozone standard. *See id.* at 1046 & nn.6-7; *see also* Cloud & Conerly, *supra* note 143, at S29 (analyzing the impact on the EPA's ability to revise the primary NAAQS for ozone in light of the amendments).

The holding seems to suggest that the EPA can never stray from the current primary standards for ozone, unless the agency requests the legislation to do so. *See id.* at S29 (concluding "[a] fair reading . . . suggests that under current statutory mandates the EPA can never enforce or implement a new primary ozone standard that varies from the current one-hour standard"). The court also concluded that the EPA's NAAQS for PM₁₀ were arbitrary and capricious because the agency "consider[ed] factors unrelated to public health," which is the only issue under the Clean Air Act for the agency to consider. *American Trucking*, 175 F.3d at 1054-55. The court referred to its previous holding in *National Resources Defense Council, Inc. v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), which held that appropriate levels of safety "must be based solely upon the risk to health." *Id.* (quoting *National Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1166 (D.C. Cir. 1987) (in banc), the so-called *Vinyl Chloride* case).

150. *See American Trucking*, 175 F.3d at 1034.

151. *See supra* notes 7-9, 83-86 and accompanying text (commenting that since 1935 the federal judiciary has only paid lip-service to the nondelegation doctrine).

152. *See* Gray & Raul, *supra* note 23, at A26 ("The decision could have far-reaching implications for all government rulemaking."); Kriz, *supra* note 13, at 2166-67 (calling *American Trucking* a "potentially far-reaching decision" that "could call into question actions taken by other federal agencies to which Congress has given broad regulatory discretion."); May, *supra* note 3, at 20 (arguing that the court's holding was a good one and necessary for the government to become more accountable); *supra* notes 7-9, 83-86 and accompanying text. The decision did not escape the attention of the nation's leading newspapers, some of which supported the decision while others opposed it. *See, e.g., Bad Decision on Clean Air*, Editorial, N.Y. TIMES, May 19, 1999, at A22 (arguing that the case "could threaten a series of other clean-air initiatives . . . and overturn a half-century of jurisprudence that has allowed Congress to delegate important rule-making powers to [f]ederal agencies"); *Democracy 1, Tyranny 0*, *supra* note 146, at 10A (praising the decision, which "could curb the regulatory excesses that so encumber the U.S. economy—and

In examining the constitutionality of the EPA's construction of the Clean Air Act, the Court first determined whether the agency articulated an "intelligible principle" that channeled its discretion to set air quality standards.¹⁵³ The court quickly concluded that no such principle could be found in the promulgated rules.¹⁵⁴ The court pointed to EPA findings that showed "ozone definitely, and PM likely, as non-threshold pollutants, i.e., ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero."¹⁵⁵ The court found that the EPA had an unrestrained ability to set NAAQS for ozone and PM at any level above zero because any concentration of ozone or PM could be outside the "adequate margin of safety."¹⁵⁶ For instance, the court remained unconvinced that the EPA's revised 0.08 ppm ozone

American lives"); *Red Light for Regulators*, Editorial, WALL ST. J., May 18, 1999, at A26 (celebrating the return of the nondelegation doctrine and the *American Trucking* decision and its possible "far-reaching effects").

153. See *American Trucking*, 175 F.3d at 1034; see also *supra* notes 52-56 and accompanying text (discussing the development and application of the "intelligible principle" standard).

154. See *American Trucking*, 175 F.3d at 1034 (agreeing with business petitioners that the EPA construed the relative portions "of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power"). In the EPA's petition to the full D.C. Circuit for rehearing, the agency argued that the Clean Air Act provided an adequate intelligible principle: "The levels [set in a NAAQS] must be necessary for public health protection: neither more nor less stringent than necessary." *American Trucking Ass'ns v. EPA*, 195 F.3d 4, 6 (D.C. Cir. 1999) (per curiam) (quoting the EPA Petition for Rehearing at 8), cert. granted, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257). The full circuit rejected the EPA's argument and declared that although the EPA claimed to have put forward an intelligible principle (something that the agency failed to do when it was before the three-judge panel), the EPA still failed to explain how the principle limited its discretion and guided the agency's decision-making process. See *id.* at 6-7. The court concluded that "[w]e express no opinion upon the sufficiency of that principle; only after the EPA itself has applied it in setting a NAAQS can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine." *Id.* at 7.

155. *American Trucking*, 175 F.3d at 1034; see *Ozone Final Rule*, 62 Fed. Reg. at 38,863 (explaining that it seems impossible to "identify [an ozone concentration] level at which it can be concluded with confidence that no 'adverse' effects are likely to occur"); National Ambient Air Quality Standards for Particulate Matter, 61 Fed. Reg. 65,638, 65,651 (1996) (to be codified at 40 C.F.R. pt. 50) (proposed Dec. 13, 1996) (citing the uncertainty of "whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur").

156. *American Trucking*, 175 F.3d at 1034 (finding that since the EPA must set NAAQS at a level adequate to protect the public health and that the only concentrations of ozone and PM entirely safe to public health is zero, the EPA's NAAQS could technically be set at any level above zero providing that the EPA "explains the degree of imperfection permitted"); see also Cloud & Conerly, *supra* note 143, at S29 (discussing the *American Trucking* decision with regard to the court's determination that the EPA "failed to establish with sufficient precision [the criteria] by which to judge whether the new eight-hour standards meet this statutory test").

standard better satisfied the Clean Air Act's mandate than an ozone level of 0.07 ppm, 0.09 ppm, or some other level.¹⁵⁷

After declaring that the revised NAAQS amounted to an unconstitutional exercise of legislative power, the D.C. Circuit compared the EPA's claims of regulatory authority to past assertions by other federal agencies, especially OSHA's claim of authority in the *Lockout/Tagout* cases.¹⁵⁸ The court concluded that the "latitude EPA claim[ed] . . . seems even broader than that [which] OSHA asserted[.]"¹⁵⁹ because at least OSHA confined its discretion "somewhere between [a] maximum feasible stringency [standard] and some 'moderate' departure from that level."¹⁶⁰ Here, the EPA's discretion would allow it to set a "maximum stringency [that] would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all."¹⁶¹ Like *Lockout/Tagout I*, the court examined the special conditions that had justified the Supreme Court's relaxed application of the nondelegation doctrine in prior circumstances, such as the President's prerogative to conduct foreign policy or manage national crises.¹⁶² The court found no such conditions in *American Trucking*.¹⁶³

The court remanded the rules so that the EPA could redraft them and provided the agency with examples of criteria it could use to tailor a narrower construction of the Clean Air Act.¹⁶⁴ The court suggested that the

157. See *American Trucking*, 175 F.3d at 1036; see also Cloud & Conerly, *supra* note 143, at S29 (analyzing the EPA's limits in promulgating NAAQS for ozone).

158. See *American Trucking*, 175 F.3d at 1037.

159. *Id.* The court noted that the choices the EPA presented itself in finding an air quality standard were innumerable—from hardly any standard at all to one so odious that an industry could find itself "hurtling over" the brink of ruin. *Id.*

160. *Id.* (noting that the revised rule OSHA promulgated after *Lockout/Tagout I*, which was later at issue in *Lockout/Tagout II*, properly constrained OSHA's discretion); see also *International Union, UAW v. OSHA*, 938 F.2d 1310, 1318 (D.C. Cir. 1991) (explaining the limits to OSHA's discretion under the OSH Act).

161. *American Trucking*, 175 F.3d at 1037.

162. See *id.*; AMAN & MAYTON, *supra* note 25, at 16; *supra* notes 42-50 and accompanying text (discussing areas historically immune from nondelegation attacks); see, e.g., *The Brig Aurora*, 11 U.S. 382, 384, 388 (1813), (upholding the President's authority to revive expired tariffs against Britain and France upon his determination that those countries were harassing U.S. merchant ships).

163. See *American Trucking*, 175 F.3d at 1037 ("No 'special theories' justifying vague delegation such as war powers of the President or the sovereign attributes of the delegatee have been or could be asserted.").

164. See *id.* at 1038-39 (suggesting that to satisfy the nondelegation doctrine, as well as previous court decisions that have prohibited the use of cost-benefit analyses for determining NAAQS, the EPA's discretion in choosing appropriate criteria is limited); see also Cloud & Conerly, *supra* note 143, at S29 (mentioning that the court set forth criteria for

EPA take into account the population affected, as well as the severity and probability of the harm caused by air pollution.¹⁶⁵ In conclusion, the court advised the EPA to seek remedial legislation from Congress if the agency could not find an appropriate standard in the Clean Air Act to channel its discretion.¹⁶⁶

C. The Dissent: Criticizing the Rigid Application of the Nondelegation Doctrine

In his dissent, Judge Tatel vehemently argued against applying the nondelegation doctrine to invalidate the revised NAAQS.¹⁶⁷ By remanding the EPA rules, Judge Tatel declared that the D.C. Circuit "ignore[d] the last half-century of Supreme Court nondelegation jurisprudence."¹⁶⁸ Judge Tatel argued that the EPA's revised NAAQS not only complied with the Clean Air Act, but were also consistent with the D.C. Circuit's ten previous decisions that upheld EPA rulemaking authority.¹⁶⁹

the EPA to consider in revising its NAAQS regulations).

165. See *American Trucking*, 175 F.3d at 1039 ("[A]n agency wielding the power over American life possessed by [the] EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability."); cf. *Ozone Final Rule*, 62 Fed. Reg. at 38,859 (detailing the factors that the EPA considered in revising its primary NAAQS for ozone). Those factors included:

- (1) Health effects information to inform judgments as to the likelihood that exposures to ambient O₃ result in adverse health effects for exposed individuals.
- (2) Insights gained from human exposure and risk assessments to provide a broader perspective for judgments about protecting public health from the risks associated with O₃ exposure.
- (3) Specific conclusions with regard to the elements of a standard (i.e., averaging time, level, and form) that, taken together, would be appropriate to protect public health with an adequate margin of safety.
- (4) Alternative views of the significance of the effects and factors to be considered in policy judgments about the appropriate elements of the standard.

Id.

166. See *American Trucking*, 175 F.3d at 1040 (declaring that if the EPA disagrees with the court's suggestions for appropriate criteria, the agency can appeal to Congress for legislation codifying its preferences); see generally SCHOENBROD, *supra* note 25, at 72-81, 147-150 (arguing that Congress limited the Clean Air Act's effectiveness by choosing to delegate many hard choices to the EPA); *id.* at 135-152 (arguing that federal public policy would be enhanced if Congress spent less time delegating its responsibilities to agencies and more time making fewer, less complex laws "that harness private arrangements to take account of varying circumstances").

167. See *American Trucking*, 175 F.3d at 1057-62 (Tatel, J., dissenting) (dissenting only to Part I of the opinion, which concerned the nondelegation doctrine).

168. *Id.* at 1057 (Tatel, J., dissenting).

169. See *id.* (Tatel, J., dissenting) (arguing that the Clean Air Act has been on the books for decades and the court has never threatened to void any portion as an unconstitutional delegation of legislative authority); see, e.g., *Automotive Parts Rebuilders Ass'n v.*

Judge Tatel also compared the Clean Air Act's delegated authority to the language of other statutes that the Supreme Court and D.C. Circuit upheld, which gave agencies broad regulatory authority to protect and promote the "public interest."¹⁷⁰ For instance, section 303 of the Communications Act of 1934, which provided the FCC with broad power to regulate broadcasting licensing in the "public interest," was upheld by the Court in the *Networks Case*.¹⁷¹

Judge Tatel also addressed the majority's contention that the D.C. Circuit's holdings in the *Lockout/Tagout* cases demanded a harder look at whether the agency articulated an intelligible principle in issuing rules.¹⁷² Judge Tatel concluded that the principles constraining the EPA's discretion contained at least the specificity as those sustained by the court in *Lockout/Tagout II*.¹⁷³ Further, Judge Tatel argued that section 109 of the Clean Air Act, which directed the EPA to set NAAQS at levels necessary to protect public health with "an adequate margin of safety," appropriately channeled the EPA's discretion because it established NAAQS at levels low enough to at least ensure a "high degree of protection."¹⁷⁴

EPA, 720 F.2d 142, 162 (D.C. Cir. 1983) (upholding an EPA rule that implemented a revised Clean Air Act provision that required auto manufacturers to ensure that their vehicles will perform in accordance with applicable emission standards); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1184 (D.C. Cir. 1980) (upholding the EPA's authority to issue NAAQS for lead); *Ethyl Corp. v. EPA*, 541 F.2d 1, 7 & n.2 (D.C. Cir. 1976) (upholding an EPA regulation requiring annual reductions in the lead content of gasoline); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 726-27 (D.C. Cir. 1974) (upholding an EPA rule that prohibited the sale of leaded gasoline to individuals with automobiles equipped with catalytic converters, which helps to reduce exhaust emissions); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (upholding the EPA's authority to set NAAQS for sulfur oxides).

170. *American Trucking*, 175 F.3d at 1057-58 (Tatel, J., dissenting) (citing the *Networks Case*, 319 U.S. 190, 225-26 (1943), which sustained the FCC's power to regulate broadcast licensing based on the "public interest," and *Milk Industry Foundation v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998), which upheld the authority of the Agriculture Secretary to recognize dairy compacts upon a showing that the "public interest" would benefit); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding the FCC's power to regulate the cable industry as "public convenience, interest, or necessity requires").

171. *Networks Case*, 319 U.S. at 224-27 (upholding a delegation of power of the FCC under section 303 of the 1933 Act to regulate the broadcasting industry by promoting the "public interest"); see also *American Trucking*, 175 F.3d at 1057 (Tatel, J., dissenting).

172. See *American Trucking*, 175 F.3d at 1058-59 (Tatel, J., dissenting).

173. See *id.* (Tatel, J., dissenting) (applying the court's reasoning in *Lockout/Tagout II* to its analysis of section 109 of the Clean Air Act).

174. *Id.* at 1059 (Tatel, J., dissenting) (arguing that the statutory language that bound OSHA's discretion in promulgating lockout/tagout rules, which the court ultimately upheld in *Lockout/Tagout II*, paralleled the language of section 109); see also, e.g., Clean Air Act § 109, 42 U.S.C. § 7408(a)(2) (1994) (directing the EPA to create NAAQS with crite-

Judge Tatel further argued that section 109's mandate that the EPA use the "latest scientific knowledge" when revising ozone and PM attainment levels further limited the agency's discretion.¹⁷⁵

III. REINVIGORATING THE NONDELEGATION DOCTRINE: ENSURING GREATER ACCOUNTABILITY FROM GOVERNMENT BY LIMITING ARBITRARY BUREAUCRATIC POWER

The D.C. Circuit's holding in *American Trucking* breathed new life into a constitutional doctrine that many legal scholars once considered dead or at least comatose.¹⁷⁶ Although the court's holding fell short of returning to the standard articulated in *Schechter*,¹⁷⁷ if the decision stands, it likely will have a significant impact on future attempts by federal agencies to implement or modify broad regulatory policies.¹⁷⁸ If anything, the *American Trucking* decision demonstrates that *Lockout/Tagout I* and *Benzene* were not anomalies.¹⁷⁹ Instead these cases may be the beginning of a new nondelegation doctrine jurisprudence, in which the federal judiciary looks harder at regulations that are broad in scope and devoid of

ria that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities").

175. *American Trucking*, 175 F.3d at 1058 (Tatel, J., dissenting); see also, e.g., 42 U.S.C. § 7409(b)(1) (1994) ("National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.").

176. See *supra* note 23 and accompanying text (explaining a popular view within the legal community that regarded the nondelegation doctrine as a dead letter before the *American Trucking* decision).

177. See *American Trucking*, 175 F.3d at 1033-34 (remanding the revised NAAQS to the EPA to develop a constitutional construction of the requisite provisions of the Clean Water Act to comply with the nondelegation doctrine); cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550-51 (1935) (invalidating the NIRA after the Court concluded the act's provisions constituted an excessive delegation of authority by Congress); see generally *News from the Circuits*, *supra* note 105, at 6 ("It was widely, if inaccurately, reported in the press that the D.C. Circuit had held a portion of the Clean Air Act an unconstitutional delegation of legislative authority.").

178. See *News from the Circuits*, *supra* note 105, at 6 (observing that the court in *American Trucking* did not strike down a statute or a regulation, but remanded the rule and required the agency to develop a narrower construction of the underlying statute); see also May, *supra* note 3, at 20 (arguing that the doctrine is a "useful antidote to our somewhat eroded separation of powers" principle); *Bad Decision on Clean Air*, *supra* note 152, at A1 (warning of the possible consequences if the Supreme Court affirms the *American Trucking* decision).

179. See Kriz, *supra* note 13, at 2167 (noting that the Court has taken increasingly conservative stands on constitutional issues and that several other courts are also "flashing conservative colors").

any congressionally-prescribed standards.¹⁸⁰

Along with *Schechter* and *Panama Refining*, the Court's rather recent articulation of the nondelegation standard in *Benzene* served as an exemplar for the majority's holding in *American Trucking*.¹⁸¹ In *Benzene*, a majority of the Court found OSHA's rule limiting benzene in the workplace to be outside the scope of its delegated power.¹⁸² Instead of invalidating the underlying statute, as the Court did in *Schechter* and as Justice Rehnquist advocated in *Benzene*,¹⁸³ the plurality in *Benzene* construed the OSH Act narrowly to avoid finding an open-ended delegation.¹⁸⁴ The *Benzene* Court chose to invalidate the rule for being too broad in scope, not the statute.¹⁸⁵ Similarly in *American Trucking*, the D.C. Circuit refused to apply the nondelegation doctrine strictly to strike down the Clean Air Act or any of its relevant provisions.¹⁸⁶ Instead, the court used the nondelegation doctrine as a canon of statutory interpretation to construe the Act narrowly.¹⁸⁷ Unlike the *Benzene* Court, however, the D.C. Circuit refused to search for an intelligible principle in the Clean Air Act's ambiguous language.¹⁸⁸ Instead, the appeals court ordered the EPA to develop another interpretation of the Clean Air Act that confined the agency's discretion.¹⁸⁹ This decision refrained from placing the

180. See May, *supra* note 3, at 20 (advocating for the return of the nondelegation doctrine in order to breathe new life into the separation of powers doctrine); Kriz, *supra* note 13, at 2167 (pondering the possible ramifications of the *American Trucking* decision, including the possibility of the Court embracing the D.C. Circuit's rationale).

181. See *American Trucking*, 175 F.3d at 1038.

182. *Benzene*, 448 U.S. 607, 645 (1980) (5-4 decision) (concluding that Congress could not have intended to provide OSHA with the unprecedented power that the agency claimed over domestic industry).

183. *Id.* at 687 (Rehnquist, J., concurring) (calling for portions of the OSH Act to be invalidated as excessive delegations of congressional authority).

184. *Id.* at 646 ("A construction of the statute that avoids . . . [an] open-ended grant [of legislative authority] should certainly be favored.").

185. *Id.* at 645 ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry.").

186. *American Trucking*, 175 F.3d at 1038 ("[W]e do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine.").

187. See *id.* (reasoning that remanding a rule ensures that the courts will "not hold unconstitutional a statute that an agency, with the application of its special expertise could salvage").

188. See *American Trucking Ass'ns v. EPA*, 195 F.3d 4, 8 (D.C. Cir. 1999) (per curiam) (deferring to the agency's reasonable interpretation), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257).

189. See *id.* (concluding that the Court's approach in *Benzene*, where the Court identified an intelligible principle within a vague statute, has given way to *Chevron* deference,

burden on Congress to make better, less ambiguous law,¹⁹⁰ and instead required the agency to tailor a rule that would limit its own authority.¹⁹¹

The D.C. Circuit's holding in *American Trucking* also follows the court's prior decision in *Lockout/Tagout I*.¹⁹² Judge Williams authored the majority opinion in both cases¹⁹³ and found unconstitutional delegations of legislative power when the EPA and OSHA claimed to possess the authority to formulate any standard under the sun—from no standard at all to a standard so excessive as to force an industry into ruin¹⁹⁴—either in the name of improved air quality¹⁹⁵ or workplace safety.¹⁹⁶

which requires agencies to make policy decisions). “[J]ust as we must defer to an agency’s reasonable interpretation of an ambiguous statutory term, we must defer to an agency’s reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority.” *Id.* (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)).

190. See *American Trucking*, 175 F.3d at 1038. The court in *American Trucking* provided three rationales for the nondelegation rule: (1) to prevent agencies from exercising delegated authority arbitrarily; (2) to “enhance . . . meaningful judicial review;” and (3) to ensure that Congress decides important policy choices for the nation. *Id.* The court stated that the *American Trucking* decision served the first two rationales, but not the last. *Id.*

191. See *id.* The court reasoned that *American Trucking*, by providing agencies with the opportunity to refashion rules that courts consider excessively broad, would advance the primary rationale for the nondelegation doctrine. See *id.* As the court articulated:

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to exact a determinate standard on its own.

Id.; see also *News from the Circuits*, *supra* note 105, at 6 (observing that the D.C. Circuit in *American Trucking* remanded the revised NAAQS regulations to the EPA to enable the agency to reinterpret the rule more narrowly).

192. See *American Trucking*, 175 F.3d at 1038 (citing the *Lockout/Tagout I* decision, which granted OSHA the opportunity to find a “determinate standard” to confine its claims of broad regulatory authority); see also *News from the Circuits*, *supra* note 105, at 6 (noting that the court, in both *Lockout/Tagout I* and *American Trucking*, remanded regulations to their respective agencies so that these agencies could refashion rules that comply with the nondelegation doctrine).

193. See *American Trucking*, 175 F.3d at 1033 (explaining that Judge Williams wrote Part I of the *American Trucking* decision); *Lockout/Tagout I*, 938 F.2d 1310, 1312 (D.C. Cir. 1991) (noting that Judge Williams wrote the court’s opinion).

194. See *American Trucking*, 175 F.3d at 1037 (observing that the EPA’s alleged regulatory authority could significantly affect the national economy); *Lockout/Tagout I*, 938 F.2d at 1317 (“[The] scope of [OSHA’s] regulatory program is immense, encompassing all American enterprise.”). The court in *American Trucking* required “a ‘more precise’ delegation than would otherwise be the case” because regulatory programs have the potential of affecting national commerce on a grand scale. *American Trucking*, 175 F.3d at 1037 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935)).

195. See *American Trucking*, 175 F.3d at 1037 (finding the “EPA’s formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concen-

Another crucial similarity is that both decisions stopped short of vacating the respective regulations.¹⁹⁷ Instead, the court, in each case, remanded the rules to allow the agencies to reinterpret their enabling statutes and to confine their own claims of regulatory authority.¹⁹⁸ As the court articulated in *American Trucking*, “[i]f the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily.”¹⁹⁹

By remanding and not vacating these regulations, the D.C. Circuit, like the Supreme Court in *Benzene*, took a middle course that lies to the left of *Schechter* and Justice Rehnquist’s concurrence in *Benzene*,²⁰⁰ and to the right of the *Networks Case*.²⁰¹ The court’s logic seems to balance the calls for strict adherence to the nondelegation doctrine with practical considerations,²⁰² such as the institutional advantages agencies have over Congress in acting expeditiously in crafting detailed solutions to complex national problems.²⁰³ The *American Trucking* holding suggests that although the court will not permit an excessively broad delegation of leg-

trations yielding London’s Killer Fog” for its revised ambient air quality standard).

196. See *Lockout/Tagout I*, 938 F.2d at 1318 (finding that OSHA’s claimed authority roamed between a rigorous standard of workplace safety and a relaxed one as a violation of the nondelegation doctrine); see also *News from the Circuits*, *supra* note 105, at 6 (summarizing the *American Trucking* decision and comparing it to *Lockout/Tagout I*).

197. See *American Trucking*, 175 F.3d at 1033 (remanding the revised NAAQS to the EPA to develop a construction of the Clean Air Act that satisfies the nondelegation doctrine); *Lockout/Tagout I*, 938 F.2d at 1326 (“[W]e remand the case to OSHA for further consideration in light of this opinion.”).

198. See *American Trucking*, 175 F.3d at 1038; *Lockout/Tagout I*, 938 F.2d at 1313 (remanding the rule governing lockout/tagout safety procedures to OSHA for further consideration in light of the court’s decision that the rule violated the nondelegation doctrine); see also *supra* note 192 (discussing the results of the *American Trucking* and *Lockout/Tagout I* decisions).

199. *American Trucking*, 175 F.3d at 1038.

200. See *supra* notes 97-100 and accompanying text (discussing Justice Rehnquist’s concurrence in *Benzene*, 448 U.S. 607 (1980)). In *American Trucking*, the D.C. Circuit specifically stated that its holding did not extend as far as Justice Rehnquist’s concurrence in *Benzene*. *American Trucking*, 175 F.3d at 1038.

201. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding a broad delegation of regulatory authority to the FCC); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (invalidating the NIRA as an unconstitutional delegation of legislative power to the executive branch).

202. See AMAN & MAYTON, *supra* note 25, at 10-11 & n.6 (explaining the difficulty in finding the line that divides permissible versus impermissible delegations).

203. See LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 86-89 (3d ed. 1991) (explaining the need for the delegation of certain powers to administrative agencies because members of Congress and their staff “lack the expertise to draft specific language” and cannot predict future events, which are often better left to the agencies to fashion timely responses).

islative power to the agencies, especially one unrestrained by congressionally-imposed standards, neither will the court create an unworkable situation for Congress by requiring it to codify every substantive policy proposal.²⁰⁴ In taking a middle-of-the-road approach, the D.C. Circuit recognized the need for Congress to delegate certain tasks to the agencies where manpower and expertise are abundant and the flexibility exists to formulate more precise and timely regulations.²⁰⁵ In other words, the agency still "will make the fundamental policy choices."²⁰⁶ At the same time, however, the court's position respects the democratic principle of accountability and the separation of powers doctrine²⁰⁷ by requiring an agency to provide an intelligible principle and to explain that it promulgated regulations accordingly.²⁰⁸

IV. CONCLUSION

The *American Trucking* decision, coupled with the D.C. Circuit's earlier *Lockout/Tagout I* decision and the Supreme Court's *Benzene* ruling, provide for a new jurisprudence governing the nondelegation doctrine and claims of broad rulemaking authority by the federal agencies. These decisions declare that the federal judiciary will not ignore an administration's assertion of carte blanche authority to implement expansive new policies without articulating an "intelligible principle" in a federal statute that appropriately channels its discretion. Unlike the *Schechter* decision

204. See Cohen, *supra* note 103, at 1147.

205. See *supra* note 203 and accompanying text; see also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."); U.S. CONSTITUTION: ANALYSIS, *supra* note 7, at 71 (explaining that the Court upheld broad delegations of legislative power because Congress is often incapable of foreseeing or responding to problems caused by the application of general law to specific situations); cf. Kriz, *supra* note 13, at 2167 (quoting New York Law School Professor David Schoenbrod, who interpreted *American Trucking* to be aimed more against Congress for making a vague law, rather than the EPA).

206. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (per curiam), modified, 195 F.3d 4 (D.C. Cir. 1999), cert granted, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99-1257).

207. See May, *supra* note 3, at 20 (arguing that more decisions like *American Trucking* will hold the government more accountable for public policy decisions). But see Recent Case, *Administrative Law—Nondelegation Doctrine—D.C. Circuit Holds That EPA Construction of Clean Air Act Violates Nondelegation Doctrine*, 113 HARV. L. REV. 1051, 1056 (2000) (arguing that the court's decision ultimately serves to promote less accountability because it arrogates less power to Congress and more power to the judiciary, which is "less accountable than either of the political branches").

208. See *American Trucking*, 195 F.3d at 7.

in which the Supreme Court invalidated a federal statute, the nondelegation doctrine is now enforced by remanding regulations for reformulation when agencies step beyond their traditional rulemaking function and venture into the realm of lawmaking. Such a modest application of the nondelegation doctrine will likely serve to promote political accountability without ignoring the practical needs of Congress to delegate certain matters to the agencies, which are generally rich in manpower and technical expertise.

